Honorable Robert Bryan

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN S TEMPLE, Plaintiff, v ALLSTATE INSURANCE COMPANY, a foreign corporation, Defendant	NO C01-5124 **DEFENDANT ALLSTATE'S MOTION FOR SUMMARY JUDGMENT** **NOTE FOR MOTION: SEPTEMBER 13, 2002**

I. INTRODUCTION

In this lawsuit, Plaintiff John Stephen Temple ("Plaintiff" or "Temple") challenges virtually every aspect of his employment with Allstate Insurance Company ("Allstate") beginning in the fall of 1998 he claims that Allstate misclassified him as an exempt employee and failed to pay him overtime, he claims that he had a disability and that Allstate failed to accommodate that disability when it insisted that he keep his office open during required hours, he claims that management harassed and retaliated against him, and he claims that Allstate's decisions to end its employee agent program and to require a waiver as a condition of the terminated agents' receipt of certain enhanced benefits were retaliatory and

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had a dısparate ımpact on agents lıke Temple From the dıscovery motıons previously filed wıth the court, Temple's strategy ıs clear through hıs "shotgun" approach to lıtıgatıon, and ınflammatory statements desıgned to generate sympathy for hımself, he hopes to dıstract the Court from focusıng on the legal standards he must meet However, rhetorıc, vague assertıons, and appeals for sympathy are not suffıcıent to avoıd summary judgment To survıve summary judgment Temple must produce credıble, admıssıble evıdence showıng that Allstate acted unlawfully under one or more of the legal causes of actıon pled ın hıs Second Amended Complaınt He cannot meet that burden Whıle Allstate concedes that there are many facts ın dıspute, there are no genuıne ıssues of materıal fact that would allow a jury to find ın favor of Temple under any theory of law Consequently, Allstate ıs entıtled to summary judgment

II. STATEMENT OF RELEVANT FACTS

At all relevant tımes, Allstate has marketed ınsurance through a network of agents workıng ın varıous locatıons throughout the country (Declaratıon of Barry Hutton ("Hutton Decl ") ¶ 4) Although Allstate has tradıtıonally relıed prımarıly on agents who have sold Allstate products exclusıvely, the structure of the agent network has changed sıgnıficantly over the years (Id) Prıor to June 30, 2000, when the changes at ıssue ın the lawsuıt occurred, Allstate's agency workforce had evolved ınto sıx dıfferent programs wıth 11 dıfferent contract/ admınıstratıve requırements (Id)

Plaıntıff was employed by Allstate as an employee agent from August 1987 through June 30, 2000 (Deposıtıon of John S Temple ("Temple Dep ") at 31 5-32 13)[1] Throughout most of hıs employment, Temple worked as a "Neıghborhood

[1] Excerpts of the Temple Deposıtıon are attached as Exhıbıt 1 to the Declaratıon of Karen F Jones ın Support of Allstate's Motıon for Summary Judgment ("Jones Decl ")

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Office Agent" ("NOA") in a single-agent office in Port Angeles, Washington under a contract with Allstate referred to as the R1500 contract (Hutton Decl ¶ 7, Temple Dep at 40.13 – 41.8, 45 14-18) The facts relevant to this case occurred during the period beginning in the August of 1998 through June 30, 2000 See Second Amended Complaint at ¶¶ 14 – 27 Because Temple asserts numerous claims, each of which turns on different facts, Allstate will discuss the relevant facts in the context of the legal claims to which they relate

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate under Fed R Civ P 56 where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law British Airways Board v Boeing Co , 585 F 2d 946, 950-51 (9th Cir 1978) In discrimination cases, as in other disputes, summary judgment is an appropriate vehicle for courts to identify meritless suits and dispense with them short of trial Foster v Arcata Assocs, Inc , 772 F 2d 1453, 1459 (9th Cir 1985) (affirming summary judgment on employee's claims of age and sex discrimination), overruled on other grounds by Kennedy v Allied Mutual Ins Co , 952 F 2d 262, 266-67 (9th Cir 1991), Schwenke v Skaggs Alpha Beta, Inc , 858 F 2d 627, 628 (10th Cir 1988) Summary judgment is intended to avoid a useless trial before a finder of fact Adler v Federal Republic of Nigeria, 107 F 3d 720, 728 (9th Cir 1997)

IV. TEMPLE'S CLAIMS RELATING TO ALLSTATE'S "PREPARING FOR THE FUTURE" PROGRAM SHOULD BE DISMISSED.

Several of Temple's claims relate to a program that Allstate announced in November 1999 called the "Preparing for the Future Program" (the "Program") Under this Program, for the reasons discussed below, Allstate made the business decision to eliminate all of the agency programs except its independent contractor

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Exclusive Agency program (Hutton Decl ¶ 15) As part of the Program, Allstate announced in November 1999 that it would terminate all of its employee agent contracts effective June 30, 2000[2] (Id at ¶ 16) The decision to terminate the employee agency program affected all employee agents regardless of the agents' age, performance or any other criteria, including whether or not the agent had asserted any claims against Allstate (Id at ¶¶ 15-17) Although not obligated to do so, Allstate offered each affected agent a choice of four post-termination options, three of which provided enhanced severance benefits conditioned upon the agent's signing a standard waiver and release of claims (the "Release") (Id at ¶ 16) Agents who did not sign the Release received basic severance pay of up to thirteen weeks (Id at ¶ 18) Allstate gave the agents until June 1, 2000—more than six months—to evaluate and decide among these options (Id at ¶ 16) Temple did not sign the Release and, therefore, he received basic severance benefits and retained the right to sue Allstate (Id)

Prior to Allstate's announcement of the Program, Temple had requested that Allstate accommodate an alleged disability, and he had complained that he should be paid overtime (See Second Amended Complaint at ¶¶ 16-17, 35) In this lawsuit, Temple appears to contend that Allstate's decision to eliminate its employee agency program, and its requirement that agents sign the Release in order to receive the enhanced post-termination benefits, was a form of retaliation against him for having requested accommodations and complained about overtime He also claims that the Release was targeted at older employees and constituted disparate treatment, and that the Release had a disparate impact on employees who had colorable claims against Allstate None of these claims has any factual or

[2] The Program was not implemented in West Virginia due to specific requirements in that state The Program's effective date varied in Delaware and Montana due to specific requirements in those states

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legal support

A. <u>Undisputed Facts Related to These Claims.</u>

Agent Programs Prior to 1999

Prior to 1984, Allstate sold its insurance products exclusively through employee agents located in Sears retail stores or in local sales offices known as "Neighborhood Sales Offices" or "NSOs" (Hutton Decl ¶ 5) NSO agents worked in groups, and their office space, support staff, and standard office equipment and furniture were provided by Allstate (Id) In response to changing market conditions, Allstate revised its agent structure in 1984 and introduced the "Neighborhood Office Agent" or "NOA" program (Id) This program was designed to provide employee agents with more entrepreneurial freedom, and it initially proved extremely successful for Allstate and its agents (Id)

Prior to June, 2000, Allstate's employee agents worked under a number of different written employment contracts, including the "R830" and "R1500" contracts (Hutton Decl ¶ 9) Under both the R830 and R1500 contracts, Allstate employee agents were at-will employees who could be terminated with or without cause at any time Id Temple was employed under the R1500 contract, which stated that "<u>Your employment and this Agreement may be terminated at-will by either party</u>, subject only to such limitations and restrictions as may be imposed by law, and in accordance with Company rules and procedures" (Id at ¶ 9, Ex A) Neither the R830 nor the R1500 contract contained any term that provided for severance benefits if either party terminated the agreement or the agent's employment (Id) Agents such as Temple who were employed under R1500 or R830 agreements did not obtain a transferable interest in any of the insurance business they produced or serviced (also referred to as "book of business") (Id at ¶ 10) Consequently, Temple did not own the customer accounts of the Allstate policyholders that he sold

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or serviced on behalf of Allstate and he could not sell those accounts to anyone

In 1990, Allstate further revised its agency structure by introducing the Exclusive Agency ("EA") program. (Hutton Decl ¶ 11) Under the EA program, new agents typically started as employee agents under the "R3000" agreement (Id) After 18 months, if the agent met specific production standards and other requirements, subject to company approval, the agent was offered the "R3001" EA contract to sell Allstate products as an independent contractor (Id) All agents who were engaged after 1990 were offered contracts only under this new Exclusive Agency program (Id)

The 1999 Business Reorganization Decision

In November 1999, Allstate announced its decision to move forward with a new business model, designed to increase productivity for the company and its agents, and to allow the company to better compete in a changing marketplace (Hutton Decl ¶ 12) In connection with its new business model, Allstate adopted the "Preparing for the Future Program" to enhance growth and profitability by, among other changes, consolidating multiple agent programs, contracts and compensation schedules into a single Exclusive Agency independent contractor program (Id)

The Preparing For the Future Program involved the streamlining and reorganization of Allstate's agency force, from six different agency programs (under various contracts including the R830, R1500, R3000 and R3001 contracts) with over eleven different sets of contract administrative requirements into a single program (Hutton Decl ¶ 13)

When Allstate announced its new business model and the Preparing for the Future Program in 1999, the company had approximately 6,000 independent contractor agents in its EA program and approximately 6,400 employee agents

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working under either the R830 or R1500 contracts (Hutton Decl ¶ 14)

Allstate made a business decision to eliminate all of the agency programs except its Exclusive Agency independent contractor program (Hutton Decl ¶ 15) This decision to terminate employee agent contracts was reached in November 1999, prior to announcing the Preparing For the Future Program (Id) Allstate's decision was based on a number of considerations, including the increased productivity of independent contractor agents and Allstate's business judgment and belief that the Exclusive Agency independent contractor program was and would continue to be its most successful agency program (Id) In addition, Allstate wanted to streamline the administration of its agency programs (Id) The cost and complexity associated with making changes to all of its existing programs were inefficient, and Allstate wanted to better position itself and its agents to more quickly and competitively respond to the demands of the market (Id)

Allstate announced the Preparing for the Future Program to all of its agents in November 1999 (Hutton Decl ¶ 16) At that time, the company announced that the employment of all of its employee agents would be terminated as of June 30, 2000 (Id) Allstate also announced that each terminated agent would have the choice of four options after employment termination (Id) Three of those options, described in more detail below, involved the execution of a release for which the terminated employee agent would receive valuable consideration (Id) Each of the affected agents was provided with a package of written materials regarding the Program, which included an explanation of why Allstate was terminating the contracts with its employee agents, and detailed information about the four options and how the Program could benefit employee agents (Id at Ex B) Along with the program booklet, Allstate gave each employee agent a Release Notice that specifically explained the release associated with three of the four options described

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below (Id at ¶ 16) Among other things, the Release Notice specifically encouraged agents to consult with their attorney prior to signing the release (Id Ex C) Agents were given until June 1, 2000—more than six months—to evaluate their options, consult with their attorneys if they so chose, and decide whether or not to sign the release (Id at ¶ 16)

Allstate's decision to terminate the employment of employee agents as part of the Preparing for the Future Program extended to all of Allstate's employee agents in the United States (with the exception of agents in West Virginia due to specific requirements in that state), regardless of whether the agent signed a release (Hutton Decl ¶ 17) Allstate terminated the employment of all employee agents, and offered all the same choice of four post-employment options, regardless of age, productivity, performance, or any other criteria, including whether or not the agent had asserted any claims against Allstate (Id)

Under the first option, Severance Option Without Release, each terminated employee agent could choose to receive basic severance pay of up to thirteen weeks (Hutton Decl ¶ 18) Under this option, the terminated employee agent was not required to sign a release, but instead retained his or her right to assert any claims against Allstate should he or she have them and desire to do so Temple did not sign the release and, therefore, received these benefits (Id)

The remaining three options gave agents an opportunity to receive substantial benefits and consideration not otherwise available to the agent and to which they were not otherwise entitled (Hutton Decl ¶ 19) As is customary, agents who wanted to take advantage of one of these options, were required to sign a release in exchange for receiving these enhanced benefits (Id) These options provided as follows

(a) **The Independent Contractor Option** the terminated employee agent

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could choose to become an Exclusive Agent and sell Allstate insurance as an independent contractor (Id) In exchange for signing a release, terminated employee agents who elected to become Exclusive Agents would receive the following benefits and consideration

(1) An opportunity to earn a transferable economic interest in their book of business, including the portion previously written as an employee agent, after only two years (as contrasted with five years under the earlier EA independent contractor program),

(2) A conversion bonus of at least $5000,

(3) Forgiveness of any debts of an office expense allowance advance that otherwise would have to be re-paid upon termination, and

(4) The opportunity to grow their business and expand in new ways, including purchasing other books of business, setting up local agency extensions, and if qualified, expanding to satellite agency locations

(b) **The Sale Option** in exchange for a release, the terminated employee agent could choose to become an independent contractor Then, after only one month (instead of the two years required under the newly enhanced EA program), the agent could acquire and sell a transferable interest in his or her entire book of business, including business generated as an employee agent prior to August 1, 2002 (in contrast, agents who had converted to the EA program previously acquired only an interest in business generated after their conversion), or

(c) **The Severance Option With Release** in exchange for a release, the terminated employee agent could choose to receive enhanced severance benefits equal to one year's pay based upon the greater of the 1997 or 1998 year-end authorized compensation (Hutton Decl ¶ 19)

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Contrary to Temple's assertion, Allstate did not consider any agent claims in making its business decisions to eliminate the employee agent program or in designing or implementing any aspect of the Preparing for the Future Program, including the terms and conditions of the four options it offered affected agents (Hutton Decl ¶ 20) In making such decisions, Allstate did not assemble, analyze, or review any data about agent litigation or claims or the costs associated with such litigation or claims (Id) The decisions to terminate the employment of its employee agents and to offer the four options described above were made in Allstate's home office in Northbrook, Illinois and did not involve any of Temple's management in the Seattle region or anyone with knowledge of Mr Temple's claims, to the extent he had any (Id)

B. Temple's Retaliation Claim Fails Because There is No Evidence of a Causal Relationship Between Temple's Alleged Protected Activity and Any Adverse Employment Action.

To establish a prima facie case of retaliation under the ADA, the ADEA, the Washington Law Against Discrimination ("WLAD"), the Fair Labor Standards Act ("FLSA") and the Washington Minimum Wage Act ("MWA"), the plaintiff must show that (1) he was engaged in a protected activity, (2) his employer subjected him to adverse employment action, and (3) there is a causal link between the protected activity and the employer's action See, e g , Villiarmo v Aloha Island Air, Inc , 281 F 3d 1054, 1064 (9th Cir 2002), Weeks v Harden Mfg Corp , 291 F 3d 1307, 1311 (11th Cir 2002), Wolf v Coca-Cola Co , 200 F 3d 1337, 1342-43 (11th Cir 2000), Francom v Costco Wholesale Corp , 98 Wn App 845, 862, 991 P 2d 1182, review denied, 141 Wn 2d 1017, 10 P 3d 1071 (2000) A plaintiff who fails to present evidence indicating any causal nexus between his protected activity and the employer's adverse employment action cannot survive summary judgment See McAlindin v County of San Diego, 192 F 3d 1226, 1239 (9th Cir 1999), Feldman v

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American Mem'l Life Ins Co , 196 F 3d 783, 793 (7th Cir 1999) There is no causal nexus if the plaintiff was treated the same as all other employees because, in that case, the plaintiff cannot establish that he was targeted for unfavorable treatment due to his protected activity McAlindin, 192 F.3d at 1239

Temple claims that (1) he and some unidentified population of employee agents engaged in protected activity, (2) he suffered from adverse employment actions, specifically, Allstate's decision to terminate his employment and require him to sign the Release to receive post-termination benefits, and (3) the adverse employment actions were caused by either his protected activity or Allstate's desire to terminate every employee agent who had engaged in protected activity Even assuming solely for purposes of this Motion that Temple can satisfy the first two elements of the test, he cannot satisfy the third element, because he cannot establish any link between Allstate's decisions and any protected activity

Temple has no evidence that Allstate's decisions concerning the Preparing for the Future Program related in any way to his claims or those of other agents To the contrary, the uncontroverted evidence shows that there was no such connection

- Allstate terminated Temple's employment as part of a company-wide reorganization that affected every one of Allstate's thousands of employee agents, whether or not they had engaged in protected activity (Hutton Decl ¶¶ 12-17, 20)
- Allstate made its decision to implement Preparing for the Future for legitimate business reasons unrelated to any protected activities (Hutton Decl. ¶¶ 15, 20)
- Allstate offered the same choice of four post-employment options to every affected employee agent, regardless of age, productivity, performance, or any other criteria, including whether or not the agent had asserted any claims against Allstate (Hutton Decl ¶¶ 16-17, 20)
- Three of the options provided substantial enhanced benefits to which the agents were not otherwise entitled Every terminating employee agent who wished to receive these enhanced benefits was required, in

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exchange, to sign the Release to receive certain post-termination benefits and business opportunities, regardless of whether they had engaged in any protected activity or previously asserted claims against Allstate (Hutton Decl ¶¶ 18-19)

- In making the decisions in question, Allstate did not consider the age, gender, race, disability, or other protected status of the agents, nor did it consider any agent claims Allstate did not assemble, analyze, or review any data about agent litigation or claims or the costs associated with such litigation or claims (Hutton Decl ¶¶ 15, 20)

- The decisions in question were made in Allstate's home office and did not involve any of Temple's management in the Seattle region or anyone with knowledge of Temple's claims (Hutton Decl ¶ 20)

In short, Temple cannot demonstrate that either he, or the unnamed group of agents who allegedly engaged in unspecified protected activities, were treated any differently than any other employee agent There is simply no evidence to show that Allstate targeted Temple or other agents who had asserted claims in making the decisions in question—in fact, the evidence establishes unequivocally that it did not As a result, Temple cannot establish a causal connection between his alleged protected activity and the alleged adverse union This Court should therefore dismiss Temple's retaliation claim See, e g , Villiarmo v Aloha Island Air, Inc , 281 F 3d 1054, 1064-65 (9th Cir 2002) (affirming summary judgment in favor of employer where employee failed to show causal link between protected activity and adverse action), Bailey v Southwest Gas Co , 275 F 3d 1181, 1187 (9th Cir 2001) (same), Nichols v Azteca Rest Enters , 256 F 3d 864, 878 (9th Cir 2001) (same)

C. It is Not Retaliatory to Require Terminated Employees to Sign a Release in Consideration for Receiving Substantial Benefits to Which They Are Not Otherwise Entitled

Temple's theory that it was retaliatory for Allstate to require a waiver of claims in exchange for enhanced post-termination benefits is completely out of step with the facts and the law Numerous courts have acknowledged and upheld the common practice of requiring a waiver as a condition of a terminated employee's receipt of post-termination benefits

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> When a worker within the class protected by age discrimination law (age 40 and up) leaves his employment, it is common for the employer to try to obtain a waiver of the workers' rights to bring a suit under that law Such waivers are enforceable if they comply with [applicable law]

Blackwell v Cole Taylor Bank, 152 F 3d 666, 669 (7th Cir 1998) The Seventh Circuit's view is consistent with numerous holdings by other federal courts that the use of such waivers advances the public's interest in resolution of actual or potential disputes. See, e g , Melanson v Browning-Ferris, Indus , Inc , 281 F 3d 272, 274 (1st Cir 2002) (the release of federal statutorily created rights ordinarily will be given legal effect so long as the release is knowing and voluntary), Stroman v West Coast Grocery Co , 884 F 2d 458, 460-61 (9th Cir 1989) (a general release of Title VII claims does not violate public policy and, to the contrary, public policy supports the settlement of employment discrimination claims)

Allstate had the right to terminate the employment of Temple and its other employee agents with no notice and without providing any post-termination benefits Instead, it gave the agents more than six months' notice in advance of their termination, and it offered them significant post-termination benefits to which they were not entitled under their contracts or otherwise Allstate's request for a release in consideration for those valuable benefits was consistent with standard business practice and public policy and does not give rise to an inference of retaliatory motive

D. Even If Temple Has Stated A Prima Facie Retaliation Claim, His Claim Must Be Dismissed Because Allstate Has Provided a Legitimate Non-Discriminatory Reason For Its Decisions

If a plaintiff establishes a prima facie retaliation claim, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its actions McAlindin, 192 F 3d at 1238 If the employer produces such a reason, the plaintiff must respond with "specific, substantial evidence of pretext " Id

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For the reasons described above, Temple has failed to establish a prima facie retaliation claim However, even if he were to satisfy this burden, Allstate has produced legitimate nondiscriminatory reasons for the Program it wanted to streamline its operations and avoid the cost and complexity of operating multiple agency programs and administering different contracts by moving to a single agency contract, which it believed would better position the company and its agents to compete more effectively, and it believed that its Exclusive Agency independent contractor program was and would continue to be its most successful agency program (Hutton Decl ¶ 15) Allstate did not consider <u>any</u> agent claims in making its business decision to eliminate the employee agent program or in designing or implementing any part of the Program, including its use of the Release, and there is no evidence to suggest the decision makers in Allstate's Home Office had any knowledge of Temple's claims (Hutton Decl. at ¶ 20) Temple cannot produce <u>any</u> evidence that Allstate's legitimate non-discriminatory motivation for the Program is pretextual Accordingly, his retaliation claim must be dismissed <u>See</u>, <u>e g</u> , <u>Strahan v Kirkland</u>, 287 F 3d 821, 826 (9th Cir 2002) (affirming summary judgment for employer on retaliation claim where plaintiff did not create genuine issue of material fact that employer's legitimate non-retaliatory reason for employment action was pretext), <u>Yap v Slater</u>, 165 F Supp 2d 1118, 1128-29 (D Hawaii 2001) <u>Harris v Oregon Health Sci Univ</u> , 1999 WL 778584, *8 (D Or 1999)

E. <u>Temple has No Evidence to Support his Claim that the Release Targeted Older Employees and Constituted Disparate Treatment.</u>

Temple also claims that Allstate's decision to terminate all of its employee agents violated the ADEA and the WLAD because it was specifically targeted at older employees Again, there is no evidence to support this assertion

To survive summary judgment on his disparate treatment claim, Temple must

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produce credible evidence showing that Allstate intentionally treated some employees less favorably than others because of their age Foss v Thompson, 242 F 3d 1131, 1134 (9th Cir 2001), Rose v Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir 1990), Kuyper v State, 79 Wn App 732, 739, 904 P 2d 793 (1995) [3] Here, the uncontroverted evidence shows that Allstate did not take age into account in making its decisions, and that it treated all employee agents the same, regardless of their age (Hutton Decl ¶¶ 15-17) Temple has no evidence to show that Allstate's stated reason for its decisions is a pretext for unlawful age discrimination See, e g , Kuyper, 79 Wn App at 736-39 (granting summary judgment for employer where plaintiff did not produce evidence of pretext for age discrimination), Kohn v Georgia-Pacific Corp , 69 Wn App 709, 726, 850 P 2d 517 (1993) (same), see also discussion in Section D above For this reason, Temple's disparate treatment age discrimination claim must be dismissed

F. Temple Fails to State a Claim for Disparate Impact Because He Does Not Allege that Allstate's Decisions Disparately Impacted any Cognizable Protected Group.

In addition to his retaliation and disparate treatment claims, Temple also claims that Allstate's use of the Release had a disparate impact on employee agents who had "colorable claims" against the company Second Amended Complaint at ¶ 30 This allegation, even if true (which it is not), fails to state a claim for disparate impact because agents "with colorable claims" are not a group protected by any statute Temple does not allege, and cannot prove, that Allstate's decisions had a disparate impact on older agents, disabled agents, or agents in any other group protected by relevant statutes

In claiming that Allstate's decisions had a "disparate impact," Temple

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[3] The Washington Law Against Discrimination mirrors the language of Title VII, and Washington courts look to ADEA case law for guidance Grimwood v University of Puget Sound, Inc , 110 Wn 2d 355, 361, 753 P 2d 517 (1988)

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appears to confuse the concept of retaliation with disparate impact As discussed above, retaliation requires a showing that an employer took some adverse action based upon an employee's protected activity, such as filing a claim Temple's allegation that Allstate decided to end its employee agency program because it wanted to rid the company of agents who had asserted discrimination claims is a claim for retaliation, and should be dismissed for the reasons cited previously

In contrast, disparate impact requires a showing that a facially neutral employment practice has a significantly discriminatory impact "upon a group protected by the statute " Paige v California, 2002 WL 1579101 at *2 (9th Cir 2002) Each discrimination statute describes the group(s) it protects Under Title VII, "[a]n unlawful employment practice based on disparate impact is established under this title only if a complaining party demonstrates that an employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin " 42 U S C § 2003-2(k) (emphasis added) The ADEA protects "individuals who are at least 40 years of age " 29 U S C § 631(a) The ADA protects "qualified individuals with a disability " 42 U S C § 12132 These are the only "protected groups" described by the statutes The only "protected groups" that arguably include Temple are individuals with disabilities and individuals 40 and older

A viable disparate impact claim exists only if an employer discriminates against one of these protected groups Thus

> To state a prima facie case under a disparate impact theory, a plaintiff must demonstrate (1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on [in the case of the ADA] persons of a particular age produced by the employer's facially neutral practices

Katz v Regents of the Univ of Calif , 229 F 3d 831, 835 (9th Cir 2000) People "who have colorable claims" are not a protected group

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Temple does not allege, nor can he prove, that Allstate's use of a Release disparately impacted agents with disabilities or those 40 and over Even assuming that some older agents had "colorable claims" against Allstate or that there were agents with disabilities and that some of them had "colorable claims," that does not prove, or even suggest, that Allstate's decisions had a disparate impact on the class of older or disabled agents To the contrary, as discussed above, Allstate's Program was designed and implemented in a manner that affected all agents equally Accordingly, Temple's disparate impact claim fails as a matter of law

G. Temple's Disparate Impact Claim Must Be Dismissed Because He Has Failed To Present Any Evidence To Support His Claim.

Even assuming that Temple's disparate impact theory is conceptually sound and identifies a cognizable protected group, it fails for lack of evidence

To present a prima facie case of disparate impact discrimination, Temple must demonstrate (1) a specific employment practice that (2) causes a significant discriminatory impact Paige, 2002 WL 1579101 at *2 A disparate impact analysis requires before and after snapshots, so to speak, to determine the effect of the employment practice in question

> In evaluating the impact of a particular process, we must compare the group that "enters" the process with the group that emerges from it . The best evidence of discriminatory impact is proof that an employment practice selects members of a protected class in a proportion smaller than in the actual pool of eligible employees

Id at *3 (emphasis added) The Ninth Circuit's comments emphasize that statistical analysis is used to determine whether a selection process selects candidates from a protected group at a different rate than from all other groups of individuals Id , see also Griggs v Duke Power Co , 401 U S 424, 432 (1971), Stout v Potter, 276 F 3d 1118, 1123 (9th Cir 2002) Statistical evidence is used to demonstrate how a particular employment practice results in a protected minority becoming

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underrepresented Paige, 2002 WL 1579101 at *2 The evidence must show a disparity that is "sufficiently substantial" as to "raise such an inference of causation " Id (quoting Watson v Fort Worth Bank & Trust, 487 U S 977, 995 (1988))

Temple's disparate impact theory utterly fails when subjected to this standard Allstate has presented unrebutted evidence that the pool of Allstate agents considered for termination is identical to the pool of agents whose employment was terminated, and this is the same pool that was required to sign the Release as consideration for valuable post-termination benefits and business opportunities These requirements were identical for employee agents in protected classes and those who had not As a result, there was no disparity whatsoever (and certainly not a "substantial disparity") in the treatment of "employees with colorable claims " Accordingly, Temple's disparate impact claim should be dismissed

H. Temple's Claim That The Release Violated the ADEA Should Be Dismissed Because the EEOC Is Pursuing that Claim in a Separate Action.

In addition to the foregoing, Temple's retaliation claim under the ADEA fails on procedural grounds On July 29, 2000, Temple filed a charge with the Equal Employment Opportunity Commission ("EEOC") in which he alleged that Allstate's use of the Release violated the anti-retaliation provisions of Title VII, the Americans with Disabilities Act ("ADA"), and Age Discrimination in Employment Act ("ADEA") See Second Amended Complaint at ¶¶ 24-25 The EEOC issued a determination notice in his favor in September 2000 Id On December 28, 2001, the EEOC filed a separate action in United States District Court for the Eastern District of Pennsylvania, in which it is pursuing claims under the ADA and ADEA identical to those alleged in Temple's Second Amended Complaint See Complaint in EEOC

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v Allstate Insurance Co , Civil Action No 01-CV-7042 [4]

Under the ADEA, the filing of a complaint by the EEOC on an individual's behalf terminates the right of the individual to bring his or her own suit Under section 7(c)(1), "the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter " 29 U S C § 626(c)(1), see also EEOC v Pan Am World Airways, Inc , 897 F 2d 1499, 1505 (9th Cir 1990), Binker v Comm Of Pennsylvania, 977 F 2d 738, 745-46 (3d Cir 1992) Pursuant to the foregoing authorities, Temple cannot pursue his ADEA claims in this lawsuit, and those claims must be dismissed for this additional reason

V. TEMPLE IS NOT ENTITLED TO OVERTIME PAY BECAUSE HE WAS AN EXEMPT ADMINISTRATIVE EMPLOYEE UNDER FEDERAL AND STATE LAW.

Temple also claims that he is entitled to overtime pay under the FLSA, 29 U S C § 201 et seq , and the MWA, RCW 49 46, for all hours he worked over 40 in each workweek of his employment with Allstate Two federal courts have recently rejected identical claims on summary judgment, holding that Allstate agents like Temple are exempt from overtime requirements See Wilshin v Allstate Ins Co , -- F Supp 2d --, 2002 WL 1474092 (M D Ga , May 10, 2002) (single NOA exempt), Hogan, et al v Allstate Ins Co , -- F Supp 2d --, 2002 WL 1396846 (M D Fla , June 25, 2002) (NOAs in a collective action were exempt) [5] The reasoning of those courts is sound and persuasive, and should be adopted in this case

A. Undisputed Facts Related to this Claim.

The NOA program allowed agents to run an Allstate agency and was designed to provide employee agents with more entrepreneurial freedom (See Hutton Decl ¶ 6) The primary duties of an NOA were the promotion and sale of

[4] A copy of the Complaint is attached as Exhibit 2 to the Jones Decl

[5] Copies of these cases are attached as Exhibit 3 to the Jones Decl

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Allstate's insurance products, advising customers regarding Allstate's products and closing sales for these products, providing service and representing Allstate to their customers, and managing the operation of their office, including the management of both licensed and unlicensed support staff utilized by the agent (Id at ¶ 7)

As an NOA, Temple had wide discretion in managing his agency business on a day-to-day basis Along with three other agents, Temple was the primary contact for Allstate customers in the Port Angeles area (Temple Dep at 91 2-9) When he set up his own agency, Temple selected the location and negotiated the lease.[6] (Id at 40 22 – 42 7, 44 21 – 45 1, 87 25 – 91 1) He decided whether to hire staff, whom he should hire, and how long staff would work (Id at 115 24 – 116 6, 402 4 – 404 1) He determined how to use his office expense allowance (See id at 99 10-23, 141 5 – 143 6) Like other NOAs, Temple and his manager also agreed on general annual sales goals and designed a business plan or set other benchmarks (whether formal or informal) to meet those goals (See Hutton Decl ¶ 8)

Although he and his manager discussed sales goals and plans to meet them, it was Temple who decided how to go about building his agency business Temple explained in his deposition that he determined how to build the business:

Q And I assume that your managers also helped you build your book of business Would that be fair to say?

A In my sales career I had more experience than my managers

Q Okay

---

[6] A person Temple planned to partner with found the location and negotiated the lease on behalf of both of them (Temple Dep at 41 5 - 42 7) Although Allstate management reviewed and authorized the lease, no one at Allstate ever failed to approve a lease negotiated by Temple (Id at 89 19 – 90 1) Temple signed the lease, and his Allstate manager did not have any dealings with his landlord (Id at 90 13 – 91 1)

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> A I built my book of business. They showed me the company guidelines to stay within I used my own sales techniques and my discovery processes that I had learned throughout my sales career incorporating their, Allstate's, and my General Motors training and all these to bring everybody in So I built, I did the selling I went to them I mean it wasn't a matter of Penny or Randy [Allstate managers] coming up and saying here, Steve, here's what I want you to do They did do that, but I had tried and proven measures and that were very successful, and I incorporated their thoughts in, but these were still mine because I firmly believed in them and they brought in business

(Temple Dep at 114 6 – 115 2)

In addition, Temple developed and used his own sales methods Temple testified in his deposition that there is no "magic formula" or "cookie cutter" way of making sales and described the sales methods he chose to use·

> Meeting and greeting and shaking hands and calling people I'd sold cars to, my friends, my relatives Anybody that I had within my circle or outside of my circle I walked around with a briefcase in my hand full of applications for over 3 years Everybody I shook hands with or looked at was a potential customer

> One brick at a time, one customer at a time, you get to know them, you get them to trust you, you get them to understand that you're there for them to take care of their needs, not just when you're selling, but when they actually need you, when they have losses and everything else Once they have established that you have established that type of rapport, they tell their circle of people, come and see my agent, he's great, come and see the person that takes care of us

(Temple Dep at 114 20 – 115 3 115 8-17)

In addition to his agency management and sales duties, Temple was responsible for retaining customers and managing day-to-day contacts with customers for both sales and service (Temple Dep at 490 17 – 491 21) He exercised substantial discretion in meeting these responsibilities For example, Temple, and not Allstate, selected the means by which he attempted to market and increase his visibility Allstate did not require agents to advertise at all, and did not

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require agents to spend any specific amount on advertising (Id at 96.15-22, 99 10-23) However, Temple chose to advertise in the local Yellow Pages and shared an advertisement with three other agents in the area (Id at 92 1 - 93 14) He designed that advertisement, which was approved by Allstate (Id at 93 9-14) Temple also decided to advertise in the *Daily News* and at one point advertised on the radio (Id at 102 13-16, 110 20 – 111 13) Finally, Temple decided how much to spend on advertising out of the Office Expense Allowance provided by Allstate (Id at 99 24 – 100 3)

Temple also decided how to retain his customers and followed through with his plan

> Q What did you have to do, Mr Temple, in order to retain your business?
>
> A Constant contact, servicing, reviewing files, the customers' policies, updating, suggestions of better coverage, give them the options I always like to think my clients were well informed I didn't make the choice for them I gave them the information and let them make the choice, based on being properly informed I think one of the biggest things is caring for the client When it comes across that you're a trustworthy individual, that once they give you their trust, saying that they trust you And so I think the better your retention is based on that value there

(Temple Dep at 491 5-17)

Similarly, Temple helped customers with any problems (Temple Dep at 117 21-23) According to Temple, he handled customer problems on his own and did not turn to his managers for help (See id at 118 1-10, 118 23 – 119 21) Although his managers "liked to give suggestions and feel important," Temple never turned to them for help and advice on customer problems (Id at 118 23 – 119 9)

Additional examples of specific tasks Temple performed include prospecting or soliciting for insurance, quoting premiums, discussing or providing advice concerning coverage, limits, or deductibles, interviewing customers for the purpose

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of completing an application, binding new policies or making changes to existing policies, and accepting payments (Temple Dep at 497 5 – 498 10 and Exhibit 35)

As an NOA, Temple was paid a commission on his sales, but he received a guaranteed minimum monthly amount of compensation During 1998 and 1999, the minimum monthly compensation was $1,500 (Declaration of Rollie Poulter ("Poulter Decl ") ¶ 6 , attached as Exhibit 12 to Jones Decl) Temple far exceeded that amount, earning $55,623 50 in 1998 and $56,644 98 in 1999, but the minimum was guaranteed for each month (See W-2 Forms for Temple from Allstate, copies attached as Exhibit 4 to the Jones Decl)

Although Temple ran his agency and was responsible for virtually every aspect of his business, he was not involved in developing the terms and conditions of the insurance policies he marketed and sold Temple did not have anything to do with designing Allstate's policies, setting the rates, or determining the deductibles, those tasks were handled by other Allstate employees (Temple Dep at 496 22 – 497 4)

B. Temple's Overtime Claims should be Dismissed to the Extent they are Barred by the Applicable Statutes of Limitation.

Temple's claims for overtime should be dismissed to the extent they are barred by the applicable statutes of limitation Temple's FLSA claims are subject to a two-year statute of limitations [7] 29 U S C § 255(a) His claims under the MWA are subject to a three-year statute of limitations See SPEEA v Boeing Co , 139 Wn 2d 824, 837, 991 P 2d 1126 (2000) As a result, any claims under the FLSA for overtime pay allegedly earned before March 8, 1999 (two years before the Complaint in this case was filed) are barred Similarly, any claims under the MWA

[7] A three-year statute of limitation applies under the FLSA if the misclassification is willful 29 U S C § 255 However, there is no evidence in this case that Allstate's classification of Temple as an exempt administrative employee was willful

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for overtime pay allegedly earned before March 8, 1998 are barred

C. **Temple was an Exempt Administrative Employee.**

The FLSA and MWA generally require employers to pay employees 1 5 times their regular hourly wage for all hours worked over 40 in a workweek 29 U S C § 207, RCW 49 46 130 However, both statutes contain exemptions from this requirement for certain workers, including executive, professional, and administrative employees See 29 U S C § 213(a)(1), RCW 49 46 010(5)(c) Temple was an exempt administrative employee under the FLSA and MWA

There are two tests for determining whether an employee is an exempt administrative employee – the "short test" and the "long test" See 29 C F R § 541 2, WAC 296-128-520 The "short test" applies when an employee earns more than $250 per week Id In this case, it is undisputed that Temple earned a minimum monthly salary of $1,500, or $375 per week (though he earned significantly more) As a result, the "short test" applies

The short test consists of the following requirements

(1) the employee is paid on a salary or fee basis at a rate of not less than $250 per week,

(2) the employee's primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, and

(3) the employee's work requires the exercise of discretion and independent judgment

29 C F R § 541 2, WAC 296-128-520 Temple's employment met each of these requirements

1 **Temple was Paid on a Salary or Fee Basis.**

Allstate paid Temple commissions on his sales but also guaranteed him a certain monthly minimum amount of pay This compensation arrangement satisfies the salary basis test, which requires that the employer pay a predetermined amount

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on a weekly or less frequent basis, and that the amount is not subject to reduction based on the quantity or quality of the work performed [8] 29 C F R §§ 541 118, 541 212 The salary basis test is satisfied by a commission compensation system that includes a minimum compensation guarantee that meets or exceeds the threshold amounts under the regulations (the equivalent of $250 per week, in the case of the short test) See 29 C F R § 541 118(b) This regulation describes "precisely" the compensation system for Allstate NOAs Hogan, 2002 WL 1396846 at *4, see also Wilshin, 2002 WL 1474092 at *11 During the relevant time period, Allstate guaranteed that Temple would be paid at least $1,500 per month, regardless of the commissions he earned As a result, Temple was paid on a "salary basis" within the meaning of the FLSA and MWA [9]

2 Temple's Job Duties were Those of an Administrative Employee.

Temple also performed exempt administrative duties as an NOA An employee satisfies the second part of the administrative exemption test where the employee's primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers 29 C F R § 541 2, WAC 296-128-520 The phrase "directly related to management policies or general business operations" refers to activities that relate to the administrative, as distinguished from production, operations of a business, and are "of substantial importance to the management or operations of the business " 29 C F R § 541 205(a) Work that is "directly and

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[8] The Washington Administrative Code does not contain a regulation defining "salary or fee basis " However, the MWA often is interpreted by reference to the FLSA Tift v Professional Nursing Servs , Inc , 76 Wn App 577, 886 P 2d 1158 (1995)

[9] Temple's compensation system also constitutes compensation on a "fee basis," which can apply in lieu of the salary basis for an exempt employee See Herr v McCormick Grain-Heiman Co , Inc , No 92-1321, 1994 WL 544513, at *3 (D Kan Sept 13, 1994), rev'd and vacated on other grounds, 75 F 3d 1509, 1513-14 (10th Cir 1996) (commission salesman paid on fee basis), see also 29 C F R §§ 541 213, 541 313(b), Fazekas v The Cleveland Clinic Fdn Health Care Ventures, Inc , 204 F 3d 673, 676-79 (6th Cir 2000)

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closely related" to the performance of exempt administrative work is also exempt within the meaning of the regulations See 29 C F R § 541 208

Temple performed "administrative" work under this definition The regulations interpreting the administrative exemption define administrative work as including (1) promoting sales, (2) representing the company; (3) planning, and (4) advising and counseling customers 29 C.F R § 541 205(b) As one of Allstate's primary contact points with the insurance market, Temple engaged in all of these activities He promoted sales of the company's products through his own marketing and advertising strategies He represented Allstate to his customers, solving their problems without the assistance of Allstate management and advising them on Allstate's products Finally, he was responsible for managing the affairs of his own Allstate agency As the Hogan and Wilshin courts held, these activities constitute exempt administrative work Hogan, 2002 WL 1396846 at *9, Wilshin, 2002 WL 1474092 at *12-14

In addition, Temple's work was of "substantial importance to the management or operation of the business of [the] employer or [the] employer's customers " 29 C F R § 541 205(a) Persons performing work of 'substantial importance' include those who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree " 29 C F R § 541 205(c) Whether work is of substantial importance depends on the nature of the work, rather than just its consequences Reich v John Alden Life Ins Co , 126 F 3d 1, 11 (1st Cir 1997) Among the examples in the regulations of positions that meet the "substantial importance" test are credit managers, claims agents and adjusters, account executives of advertising agencies, securities brokers, and promotion men 29 C F R § 205(c)(5)

NOAs' duties are "substantially important" to the operation of Allstate's

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business Hogan, 2002 WL 1396846 at *10 The activity of NOAs such as Temple in "promot[ing] sales, maintain[ing] customer relations to increase chances of renewals, and decid[ing] on which policies to promote in order to fit customers' specific needs" is work of substantial importance to Allstate Id Temple's work in identifying customer needs and advising them on Allstate's products is also work of substantial importance

Finally, Temple's work was on the administrative, and not the production, side of Allstate's business See Hogan, 2002 WL 1396846 at *8-9; Wilshin, 2002 WL 1474092 at *12-14 The "products" of insurance companies like Allstate are the insurance policies themselves Reich, 126 F 3d at 9, Hogan, 2002 WL 1396846 at *8-9, Wilshin, 2002 WL 1474092 at *12-14 Employees who "are in no way involved in the design or generation of insurance policies, the very product 'that the enterprise exists to produce and market,' cannot be considered production employees " Reich, 126 F 3d at 9, see also Hogan, 2002 WL 1396846 at *8-9, Wilshin, 2002 WL 1474092 at *12-14 Temple himself admits that he had nothing to do with designing or creating the Allstate policies he sold, setting the rates for those policies, or determining the deductibles Temple performed administrative, and not production, work

3 **Temple Exercised Discretion and Independent Judgment.**

Temple also satisfies the third requirement for the administrative exemption, that his employee's primary duty included "work requiring the exercise of discretion and independent judgment " See 29 C F R § 541 2(e)(2) The exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered " 29 C.F R § 541 207(a) The concept "implies that the person has the authority or power to make an independent choice, free

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from immediate direction or supervision and with respect to matters of significance " Id However, "it does not necessarily imply that the decisions made by the employee must have the finality that goes with unlimited authority and a complete absence of review " 29 C F R § 541 207(e) "The fact that an employee's decision may be subject to review does not mean that the employee is not exercising discretion and independent judgment " Id , see also Dymond v U S Postal Serv , 670 F 2d 93, 95 (8th Cir 1982), Spinden v GS Roofing Prod Co , 94 F 3d 421, 428-29 (8th Cir 1996) The standard to determine whether an employee exercises sufficient discretion is lenient, requiring that job duties simple "include" discretion and that the employee have the opportunity to exercise it "occasionally " 29 C F R § 541 2(e)(2), Dymond, 670 F 2d at 95

Temple exercised substantial discretion and independent judgment in the execution of his duties He determined his own sales methods and used professional discretion in determining which insurance products met his customers' needs He used his independent judgment to determine which marketing and advertising strategies to use and the amount of money he was willing to commit to these strategies Temple also made his own decisions about whether to hire support staff and the terms and conditions under which they would operate It was even Temple's decision to implement a particular strategy in order to turn customer service contacts into future renewals Temple exercised far more than the limited discretion and independent judgment necessary to satisfy the administrative exemption See Hogan, 2002 WL 1474092 at *11, Wilshin, 2002 WL 1474092 at *15

In sum, the undisputed facts show that Temple was exempt from the overtime requirements of the FLSA and MWA Temple was paid on a salary basis, performed work of substantial importance to Allstate, worked on the administrative

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side of Allstate's business, and exercised independent judgment and discretion in carrying out his duties Temple, like the NOA plaintiffs in Wilshin and Hogan, was an exempt administrative employee under the FLSA and MWA.

VI. ALLSTATE IS ENTITLED TO SUMMARY JUDGMENT ON TEMPLE'S CLAIMS THAT ALLSTATE FAILED TO ACCOMMODATE HIS ALLEGED DISABILITY IN VIOLATION OF WLAD AND THE ADA.

Temple also claims that Allstate failed to accommodate his alleged disability in violation of the WLAD and the ADA These claims relate to Allstate's implementation in 1999 of "Agency Standards," which were adopted in an effort to improve customer service and meet competitive demands The Standards required every Allstate agency to maintain specific business hours and have a licensed staff member in the office during those hours Temple claims that Allstate should have accommodated his alleged disability by either (1) allowing him to close or leave his office during the required business hours without arranging for coverage by licensed staff, or (2) allowing him to combine offices with other agents who could have covered for him during his absences

However, the undisputed facts establish that Temple was not even covered by the ADA or WLAD during much of the time at issue, and when he was arguably covered, Allstate met its obligations under those laws Temple did not have a "disability" during the initial period of time at issue, and by January, 2000, he was not a "qualified individual with a disability" covered by the ADA or WLAD, because he could not work at all During the only time period when Temple arguably was a qualified individual with a disability—between May 26, 1999 and January 2000—he did not give Allstate sufficient notice that he required accommodation Even if he had given adequate notice, Allstate already was providing Temple with one of the two requested accommodations and was not required to provide the other For all these reasons, Allstate is entitled to summary judgment dismissing Temple's

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disability claims

A. Undisputed Facts Related to this Claim.

Agency Standards

In addition to the changes in the structure of Allstate's agency force discussed in section IV above, during 1998 through 2000, Allstate made other changes designed to improve its level of customer service and to meet competitive pressures and demands (Hutton Decl ¶ 21) As Allstate evaluated the market for insurance services and customer needs, it concluded that it needed to be able to offer its customers and prospective customers greater and more consistent access to licensed agents or support staff who could handle all of the customer's insurance needs (Id) Prior to 1998, Allstate began encouraging its agents to provide improved levels of customer service through its "Guiding Principles " (Id) Under these Guiding Principles, agents were encouraged to keep their offices open from 9 to 5 on weekdays, open their offices on Saturdays, and to have licensed staff in the office during all office hours (Id) Allstate also offered incentives to agents in "Premier Services Agencies," who agreed to meet certain service standards, including keeping the agency open and staffed with licensed staff during extended hours on weekdays and on Saturdays (Id)

As competitive pressures and customer expectations continued to increase, and in an effort to establish more consistent countrywide standards for Allstate service levels, Allstate announced on August 31, 1998, a set of new "Allstate Agency Standards "[10] (Hutton Decl ¶ 22) These Agency Standards incorporated many of the principles already contained in the Guiding Principles, and being met by

[10] A copy of the relevant portion of the standards is attached as Exhibit D to the Hutton Decl

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Premier Service Agencies, but made these principles mandatory for every Allstate agency countrywide (Id)

The Agency Standards required all Allstate agencies to be open from 9.00 a m to 6:00 p m on weekdays beginning January 1, 1999, and from 9 00 a m to 1 00 p m. on Saturdays, as of July 1, 1999, excluding company-approved holidays (Hutton Decl ¶ 23) The Agency Standards also required all agencies to ensure that a licensed professional was present during all office hours, effective July 1, 1999, although some regions, including Seattle, implemented this last requirement prior to that time (Id) The Agency Standards did not require Temple or any other Allstate agent to be in his or her offices during any particular hours—the schedule the agent worked was left to the agent's discretion—but they did require the agent to keep the office open during the required hours and staffed by someone who was licensed under state law to perform critical customer services such as providing quotes, binding coverage, collecting premiums, and answering customer questions (Id) Allstate considered it critical that each of its agents meet these standards, so that it could both advertise and deliver the high level of customer service that Allstate's customers deserved and market conditions demanded (Id.)

There were numerous ways that an agent could satisfy the Agency Standards' licensed staff requirement, including hiring part-time licensed help or obtaining licensed support staff on a temporary basis (Hutton Decl ¶ 24) Even before the Agency Standards were announced, many agents employed licensed staff because that allowed them to provide better customer service and to generate higher sales (Id) After the new Agency Standards were announced, many additional agents hired licensed staff, or helped existing unlicensed staff become licensed, to meet the requirements (Id) Agents had an Office Expense Allowance, or OEA, to use for the purpose of hiring and licensing support staff, among other

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things (Poulter Decl ¶ 4) In addition to the OEA, Allstate offered agents financial incentives after implementation of the Agency Standards in exchange for getting staff licensed (Id at ¶ 5)

Temple admitted in his deposition that the Agency Standards applied to all employee agents and were consistently enforced (Temple Dep at 222 19-23, 223 13-17) As described below, Temple's problems in meeting these Agency Standards did not stem from a disability, but from the fact that he worked in a single agent office and never hired any licensed support staff

Temple's Condition During First Time Period: November 1998 - May 26, 1999

Temple's physical and mental condition varied during the time at issue in this case For purposes of this Motion, the allegations relating to Temple's condition can be broken down into three time periods, the first of which began when Temple returned to work after a paid leave of absence following a heart attack in September 1998 (Temple Dep at 250 5-9, 251 10-17, 253 20-24, Deposition of Dr John Petersen ("Petersen Dep ") at 13 3-12, 14 7-13, 15 6-11, Ex 2)[11] At the end of Temple's leave, in early November 1998, his treating cardiologist, Dr. Petersen, released Temple to return to work and resume full occupational duties (Petersen Dep at Ex 4, Temple Dep at 300 13-25) Temple acknowledged in his deposition that he was fully able to do his job when he returned to work after his heart attack (Temple Dep at 285 5-10 & 14-19) Temple's cardiologist did not place any restrictions on his ability to work during subsequent visits in November 1998 and January 1999 (Petersen Dep at 54 5-11, 56 15-25)

Temple's Condition During Second Time Period: May 26, 1999 – January 2000)

There is no evidence that Temple's condition changed until at least May 1999 About one month earlier, on April 13, 1999, Temple sent a letter to Allstate's

[11] Excerpts of the Petersen Dep are attached as Exhibit 5 to the Jones Decl

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Regional Human Resources Manager entitled "Request for Reasonable Accommodation Under ADA " (Temple Dep at 318 2-5 and Ex 10) In that letter, Temple requested "an adjustment in [his] work schedule" due to his "Heart Attack with blockage and stress " (Id) Debbie Cooper, an Allstate Human Resources Division Manager, responded by letter dated May 4, 1999 and requested "some additional information from [Temple's] physician in order to verify the existence of an [ADA] disability and the need for a reasonable accommodation " (Deposition of Debbie Cooper ("Cooper Dep ") at 118 8-22 and Ex 2,[12] Temple Dep at 326 14-18, Ex 11) Cooper enclosed a form for Temple's doctor to complete (Cooper Dep at 123 21 – 124 4, Temple Dep at 326 19 – 327 2 and Ex 11)

Temple saw Dr James Geren, an internist, on May 26, 1999 (Deposition of Dr James Geren ("Geren Dep ") at 17 1-2, Ex 3 excerpt at p 53)[13] Dr Geren completed the form, indicating that Temple had coronary artery disease, but that the condition did not limit Temple's activities (Id at 34 5-15 and Ex 4, Temple Dep at 327 3-6) Dr Geren also indicated that Temple had been diagnosed with anxiety and depression on May 26, 1999, but that those conditions did not limit Temple's activities in any way either (Geren Dep at 41 7-10, 43 6-10, Ex 4) Dr Geren also stated that Temple needed to participate in an exercise rehab program and stress reduction classes "during the work week " Id Dr Geren returned the completed form to Allstate (Temple Dep at 327 11-23)

Dr Geren's note did not notify Allstate that Temple required any change in his job, because it did not indicate that Temple needed to participate in the program or take classes during work hours, or that he needed to change his work schedule (See Geren Dep at 41 7-10, 43 6-10, Ex 4) Accordingly, Cooper responded in an

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[12] Excerpts of the Cooper Dep are attached as Exhibit 6 to the Jones Decl

[13] Excerpts of the Geren Dep are attached as Exhibit 7 to the Jones Decl

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August 11, 1999 letter to Temple

> We question why you would require a change in your work schedule in any event to participate in an exercise or stress reduction program *Such activities may be scheduled before or after your work day* Moreover, because you have discretion with respect to how you spend your work day, it would seem that it would be possible for you to schedule such activities during your agency's office hours as long as you ensure that your office will be staffed by a licensed professional in accordance with Allstate's Service Availability Standards

(Cooper Dep at 143 22-25, Ex 5 (emphasis added))

According to Temple, there were only two occasions after Dr Geren's June 6 note, and before he became totally disabled, when he allegedly notified Allstate that his medical condition required accommodation (See Plaintiff's Third Supplemental Responses to Defendant's First Interrogatories and Requests for Production at 5)[14] First, Temple claims he requested accommodation in an August 23, 1999 letter to Debbie Cooper But that letter said nothing about accommodation, and was simply a response from Temple asking Cooper to write to him on official Allstate letterhead [15] Second, Temple alleges he called Allstate manager Rob Fowler on *November 1, 1999 to request an accommodation However, there is no evidence* that any such phone call took place, even in the extensive phone records that Temple produced from his office

Temple's Condition During Third Time Period: January through June 2000

Beginning in January 2000, Temple was totally disabled and could not work with or without accommodation In January 2000, Temple began seeing Dr Franklin Walker, a clinical psychiatrist (Deposition of Dr Franklin Walker ("Walker Dep ") at 14 12-13, 16 11-16, 17 15-16)[16] Dr Walker examined Temple and concluded that Temple was unable to work and could not have performed any job at

[14] Excerpts from Plaintiff's Third Supplemental Responses are attached as Exhibit 8 to the Jones Decl

[15] A copy of Temple's August 23, 1999 letter is attached as Exhibit 9 to the Jones Decl

[16] Excerpts from the Walker Dep are attached as Exhibit 10 to the Jones Decl

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that time (Id at 50 13-15) Dr Walker saw Temple regularly until approximately June 1, 2001, and never changed his opinion that Temple was completely unable to work (Id at 50 24-51 19; 81 13-15) Dr Walker also believed that there was no accommodation by Allstate that would have allowed Temple to do his job (Id at 52 5-11)

Like Dr Walker, Dr Geren also believed that Temple was unable to perform his job, either with or without accommodation, as of early 2000 (Geren Dep at 58 9-12) Accordingly, Dr Geren completed a Family and Medical Leave request form on Temple's behalf, which declared that Temple was "unable to perform work of any kind " (Id at 58 16-24, Ex 7 at ¶ 7a) Dr Geren confirmed his opinion that Temple was totally unable to work on May 25, 2000, when he completed an Application for Long Term Disability Income Benefits for Temple (Id at 67 20-25, Ex 9) Dr Geren testified during his deposition that at the time he completed this form, Temple was unable to work indefinitely, and no accommodation by Allstate could change that (Id at 68 22 – 69 15)

Temple himself declared in a May 2000 application for disability benefits that although his health conditions first bothered him on August 28, 1998, he first became unable to work on January 12, 2000 (Temple Dep at 464 4-15, Ex 26)

B. The Undisputed Facts Establish that Temple was Not Disabled within the Meaning of WLAD or ADA During the First Time Period.

To establish a prima facie case of failure to accommodate under the ADA, a plaintiff must prove (1) that he or she is disabled within the meaning of the ADA, (2) that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation, and (3) the employer took an adverse employment action against him or her because of that disability or failed to accommodate the disability See Kennedy v Applause, 90 F 3d 1477, 1481 (9th

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Cir 1996) Similarly, to establish a prima facie case of disability discrimination under the WLAD, a plaintiff must show that (1) he or she was "disabled" within the meaning of the Act, (2) he or she was qualified to perform the essential functions of the job with or without reasonable accommodation, (3) he or she gave the employer notice of the disability and its accompanying substantial limitations, and (4) upon notice, the employer failed to reasonably accommodate the employee Hill v BCTI Income Fund, 144 Wn 2d 172, 193, 23 P 3d 440 (2001)

Temple cannot establish the first element of his case—that he was "disabled" —for the first time period at issue There is simply no evidence that Temple was disabled under either WLAD or ADA from the time he returned to work after his heart attack until his visit with Dr Geren on May 26, 1999, at the earliest

A plaintiff has a disability under the WLAD if he has a sensory, mental, or physical abnormality that has a substantially limiting effect upon his ability to perform his job Pulcino v Federal Express Corp , 141 Wn 2d 629, 641, 9 P 3d 787 (2000) The ADA's definition of disability requires a plaintiff to show that he has "a physical or mental impairment that substantially limits one or more of [his] major life activities[,]" which include functions "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working " 42 U S C § 12102(2)(A), 29 C F R § 1630 2(i) An individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives See 29 CFR §1630 2(j)(2)(ii) (2001), Toyota Motor Mfg , Ky , Inc v Williams, 534 U S 184, 122 S. Ct 681, 691 (2002) With regard to the major life activity of working, the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities 29 C.F R § 1630 2(j)(3)(i)

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Temple cannot meet the WLAD disability standard, much less the ADA's, for the first time period at issue, because there is no evidence that his heart condition "substantially limited" his ability to perform his job as an agent. Dr. Petersen released Temple to resume full occupational duties as of November 2, 1998 Until at least May 1999, there were no restrictions at all on Temple's work duties Temple has no evidence that his heart condition—or any other condition—limited his ability to work or engage in other major life activities between November 1998 and May 26, 1999 The Court should dismiss any disability claims by Temple based on this time period

C. <u>The Undisputed Facts Establish that Allstate Did Not Have Any Duty to Accommodate Temple after January 2000 because He was Totally Disabled and Not a Qualified Individual with a Disability.</u>

Similarly, any reasonable accommodation claims by Temple for the third time period (January through June 2000) must fail Temple cannot satisfy the second requirement for a prima facie case as to this period, because he was unable to work and thus was not a "qualified individual" with a disability A "qualified individual with a disability" is a person who, with or without reasonable accommodation, can perform the essential functions of [his or her] job <u>Weyer v Twentieth Century Fox Film Corp</u>, 198 F 3d 1104, 1108 (9th Cir. 2000) (<u>quoting</u> <u>Cleveland v Policy Mgmt Sys Corp</u>, 526 U S 795, 806 (1999) (<u>quoting</u> the ADA)) A totally disabled plaintiff cannot establish that he is a "qualified individual" because there is no genuine issue of fact that he could have performed the job with the proposed, or any other, accommodation <u>Id</u> at 1108-09; <u>Kennedy</u>, 90 F 3d at 1481-82

The undisputed evidence demonstrates that Temple was unable to perform his job as an NOA, with or without accommodation, as of January 12, 2000 He therefore was not a "qualified individual" under the ADA Since January 2000, no doctor has <u>ever</u> told Temple that he was able to return to work, either with or without

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accommodation (Temple Dep at 467 16-19, 469 1-5) Consequently, any reasonable accommodation claims after January 12, 2000 should be dismissed

D. <u>To the Extent that Allstate Had a Duty to Accommodate Temple During the Latter Months in 1999, It Met Its Duty as a Matter of Law.</u>

The only time period when Temple arguably was a qualified individual with a disability was the time from May 26, 1999 until January 12, 1999 Although Allstate does not concede that Temple was a qualified individual with a disability during this period, its motion is based on the undisputed facts that (1) Allstate did not have notice that Temple had a disability that required accommodation at any time during 1999, and (2) Allstate already was providing one of the two accommodations Temple claims Allstate should have made (time to leave the office during the work day), and was not required to provide the other (forcing other agents to share an office with Temple)

1 Dr. Geren's June 1999 Note Did Not Put Allstate on Notice that Temple Had a Disability that Required Accommodation.

Allstate did not have a duty to accommodate Temple's alleged disability, because it never had notice that Temple's condition required accommodation Under WLAD, an employee must give notice to his or her employer that she has a disability *requiring* accommodation <u>Snyder v Medical Serv Corp of E Wash</u>, 98 Wn App 315, 326, 988 P 2d 1023 (1999), <u>aff'd</u> 145 Wn 2d 233, 35 P.3d 1158 (2001) (emphasis added) Where an employee gives notice that he has a disability but there is no indication that the disability requires accommodation, the employer's duty goes no further <u>Lindblad v Boeing</u>, 108 Wn App 198, 205-06, 31 P 3d 1 (2001) "[N]o duty arises unless there is a need for accommodation " <u>Id</u> at 205 (<u>quoting</u> <u>Maxwell v Dep't of Corrs</u> , 91 Wn App 171, 180, 956 P 2d 1110 (1998) (emphasis added)) Similarly, under the ADA, the employee has a duty to give the employer notice that he or she has a disability that requires

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accommodation Reed v LaPage Bakeries, Inc , 244 F 3d 254, 261 (1st Cir 2001) The employee's request must be "sufficiently direct and specific," giving notice that she needs a "special accommodation " Id (citing and quoting Second and Third Circuit decisions)

No such notice was ever given in this case Dr Geren's June 1999 note indicated only that Temple was unrestricted in his ability to work, and simply needed to participate in an exercise rehab program and stress reduction classes "during the work week " Employers are not obligated "to provide disabled employees with medically unnecessary accommodations." Hill, 144 Wn 2d at 193 (emphasis in original) Because the information Dr Geren provided did not indicate that any change to Temple's job duties or environment was required, it was insufficient as a matter of law to put Allstate on notice that Temple had a disability requiring accommodation

2 **Temple Did not Do Anything to Put Allstate on Notice that his Medical Condition Required an Accommodation after Providing Dr. Geren's Note.**

Between May 26, 1999, when he saw Dr Geren, and January 2000, when Temple's physicians concluded that he was totally disabled and unable to work at all, Allstate was never notified of any change in Temple's condition that required accommodation

Allstate anticipates that Temple will claim he put the company on notice of a need for accommodation in two communications to the company between August and November 1999 The first communication is Temple's August 23, 1999 letter to Debbie Cooper However, no reasonable person could conclude that the letter put Allstate on notice of a condition requiring accommodation, because all Temple said in the letter was that Cooper should write to him on official Allstate letterhead Similarly, no reasonable person could conclude that the second communication put

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Allstate on notice of Temple's need for accommodation, because Temple's own evidence contradicts his allegation on this point Although Temple claims he made the call to Fowler, it is not reflected anywhere in his extensive telephone records, and Temple did not include it in his original response to an Interrogatory that specifically requested this information (See Jones Decl , Ex 11)[17]

In summary, the only information Allstate had regarding Temple's alleged need for accommodation between May 26, 1999 and January 2000 was Geren's June 6, 1999 note That note was insufficient to put Allstate on notice that Temple's disability required accommodation as a matter of law

3 **Even if Allstate was on Notice that Temple Could Work Only With a Change to the Standards, It Satisfied Its Duty to Provide Reasonable Accommodations.**

a **The Agency Standards Provided Accommodation by Allowing Agents to Leave their Offices as Long as They Provided Coverage by Licensed Staff.**

Even assuming Temple was disabled and that he provided adequate notice in 1999 of his alleged need for accommodation, the Standards already provided the accommodation that Temple claims he required The Standards obligated agencies to be open with licensed staff available during specific hours on certain days, and categorically applied to all Allstate agents However, the Standards did not require agents to work any particular hours or to remain in their offices during the hours when the agency was required to be open Agents who needed to be away from the office could comply with the Standards by hiring licensed staff and arranging for them to be present while the agent was away Thus, the record demonstrates that the Standards provided the very accommodation Temple requested the ability to leave the office

[17] Temple did not supplement his prior response to Interrogatory No 7 until after his deposition was complete (Jones Decl , Ex 11)

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In Lindblad v Boeing Co , the Washington State Court of Appeals affirmed the dismissal of an employee's WLAD reasonable accommodation suit because the "accommodation" that the employee claimed to need could be obtained without requiring the employer to make any changes 108 Wn App at 204-06 Similarly here, the Court should dismiss Temple's claim While Temple may claim that he could not leave the office because he did not have licensed staff, it is undisputed that it was his inability or unwillingness to hire licensed staff—not his disability—that prevented him from leaving the office Allstate had a duty to accommodate Temple only if Temple actually needed accommodation due to a disability See id at 205 Temple cannot make that showing

b **Allstate Was Not Obligated to Force Agents to Combine Offices with Temple.**

Temple also claims that Allstate should have accommodated his inability to be in the office during established hours by helping him to combine offices with other agents In particular, he claims that he wanted to combine offices with any of *the other agents in the vicinity Barry Koehler, Helen Elwood, or Dwight Bondy and* Craig Brown, who already shared an office However, none of these other agents wanted to combine with Temple

Although Temple names Barry Koehler as someone with whom he could have shared an office, Temple admitted in his deposition that plans to combine offices with Koehler fell apart because of location (Temple Dep at 46 3-8, 48 18 – 49 1, 83 12 – 86 10) Elwood did not want to combine offices with Temple (Declaration of Helen Elwood ¶ 5) Brown told Allstate manager Rollie Poulter that he and Bondy did not want to combine with Temple either because they did not like Temple personally (Poulter Decl ¶ 3) Bondy also Poulter that he did not like Temple's negative personality, or the way Temple handled clients (Id)

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Consequently, while Allstate did not object to Temple's request to combine offices, it had no way of making that happen short of forcing agents who did not want to share an office with Temple to do so against their will.

Although Temple apparently contends that Allstate was obligated to force other agents to share an office with him, that contention flies in the face of EEOC Guidelines and well-established case law An accommodation that adversely impacts other employees' ability to do their jobs is an undue burden on the employer See 29 C F R § 1630 2(p)(2)(v), Mears v Gulfstream Aerospace Corp , 905 F Supp. 1075, 1081 (S D Ga 1995), aff'd 87 F 3d 1331 (11th Cir 1996), Turco v Hoechst Celanese Corp , 101 F.3d 1090, 1094 (5th Cir 1996), Milton v Scrivner, Inc , 53 F 3d 1118, 1125 (10th Cir 1995) Accordingly, this Court should dismiss Temple's claim that Allstate had a duty to accommodate his alleged disability by forcing other agents to combine offices with him

E. Temple Could Not Perform an Essential Function of the Job If He Left or Closed His Office Without Providing Licensed Staff During His Absence.

Even if Temple could establish that he was disabled and that his disability prevented him from meeting Agency Standards, he nonetheless cannot maintain a failure to accommodate claim against Allstate Allstate was not required, as a matter of law, to change its Standards to accommodate Temple's alleged disability because meeting those Standards by maintaining the required office hours was an essential function of Temple's job Under applicable federal and Washington law, an employee who cannot perform an essential function of his job due to a disability is not a "qualified individual with a disability" and is not entitled to the protections of the disability laws

As described above, Temple was not a "qualified individual with a disability" protected by the ADA and the WLAD unless he could perform the essential

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functions of the job with or without reasonable accommodation To determine whether a job function is essential, the initial inquiry is whether an employer actually requires all employees in the particular position to perform the allegedly essential function 29 C F R Pt 1630, App § 1630 2(n), Milton, 53 F 3d at 1124 An employer's judgment is also relevant evidence to be considered 42 U S C § 12111(8) In the absence of discriminatory animus, courts generally give "substantial weight" to the employer's judgment about what functions are essential Kvorjak v Maine, 259 F 3d 48, 55 (1st Cir 2001) The same essential function analysis applies under the WLAD See, e g, Clarke v Shoreline School Dist, 106 Wn 2d 102, 119, 720 P 2d 793 (1986) Where a disabled employee cannot perform an essential function of the job with or without accommodation, that employee is not a "qualified individual" under the ADA and therefore does not need to be accommodated See Kees v Wallenstein, 161 F 3d 1196-1199 (9th Cir 1998)

Providing licensed staff during the office hours required by the Agency Standards was an essential function of the agent position It is undisputed that all agents were required to comply with the Standards once they went into effect (Hutton Decl ¶ 22) Allstate established this requirement because it made the business judgment, after first experimenting with various voluntary programs, that it needed to establish consistent countrywide standards to meet competitive pressures and customer demands (Id at ¶¶ 21-22) Allstate considered it critical that each of its agents meet these standards so that it could both advertise and deliver the high level of customer service that its customers deserved and market conditions demanded (Id at ¶ 23) Temple was informed, and understood, that all agents were required to meet the Standards (Temple Dep at 222 19 – 23, 223 13-17.) For all of these undisputed reasons, maintaining regular business hours with licensed staff available at all times was an essential function of the job

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In Davis v Microsoft, 109 Wn App 884, 37 P 3d 333 (2002), the Court of Appeals recently affirmed partial summary judgment for the employer under analogous circumstances There, the plaintiff worked for Microsoft as a system engineer, a position that required him to work 60-80 hours per week The plaintiff became unable to work the required hours due to a disability, and requested that Microsoft accommodate him by allowing him to work 40 hours Microsoft argued that it was not required to change the plaintiff's work hours because 60-80 hours per week was an essential function of the job, Microsoft demonstrated that all system engineers worked 60-80 hours per week and the structure of the position did not lend itself to a regular 40-hour work week The Court of Appeals agreed and affirmed the trial court's summary judgment that overtime was an essential function of the job Id at 892 Other courts have similarly upheld summary judgment where an employee's disability prevented the employee from working scheduled hours or meeting required attendance standards Tyndall v National Educ Ctrs Inc of Calif, 31 F 3d 209, 213 (4th Cir 1994) (an employee who cannot come to work cannot perform any function, essential or otherwise), see also Barfield v Bell South Telecomms , Inc , 886 F Supp 1321, 1325 (S D Miss 1995) (regular and predictable attendance is an essential function), Santiago v Temple Univ , 739 F Supp 974, 979 (E D Pa 1990) (attendance is necessarily the fundamental prerequisite of any job)

Pursuant to these authorities, and for this additional reason, Allstate is entitled to summary judgment on Temple's disability claims under the ADA and WLAD

VII. TEMPLE'S "HOSTILE WORK ENVIRONMENT" CLAIM SHOULD BE DISMISSED.

Temple also claims that Allstate created a "hostile work environment" for him

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after he allegedly opposed what he believed to be a violation of state and federal laws (Second Amended Complaint at ¶ 31.) The basis of this claim is unclear However, it appears to be duplicative of other claims and should therefore be dismissed for the reasons described above

VIII.TEMPLE'S STATE TORT CLAIMS SHOULD BE DISMISSED.

Temple also makes the following claims under Washington law (1) wrongful discharge in violation of public policy, (2) intentional infliction of emotional distress, (3) negligent infliction of emotional distress, and (4) negligent hiring, supervision and retention "of its managers, supervisory employees, and other employees." (Second Amended Complaint ¶ 46) For the reasons set forth below, Allstate is entitled to summary judgment on these claims

A. Temple's Wrongful Discharge Claim is Duplicative of his Statutory Claims and Fails for the Same Reasons.

To prove wrongful discharge in violation of public policy, Temple must demonstrate that his termination contravened a clear mandate of public policy recognized judicially or legislatively See Snyder, 145 Wn 2d at 238-39. Here, the public policy at issue is found in the Washington Law Against Discrimination Temple claims that his employment was terminated in violation of WLAD Because this is duplicative of his statutory claim under WLAD, it fails for the reasons previously discussed in sections of this Brief addressing Temple's other claims under WLAD

In addition, Temple's claim must be rejected because he cannot show any causal connection between his age or disability and Allstate's decision to terminate his employment See, e g , Havens v C & D Plastics, Inc , 124 Wn 2d 158, 178, 876 P 2d 435 (1994) (holding that plaintiff failed to produce enough evidence of causal connection between policy linked conduct and dismissal to survive summary

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judgment) As discussed previously, Temple's employment was terminated because Allstate made the business decision to terminate the employment of all of its remaining employee agents Allstate's decision applied equally to agents who were younger than Temple, and to agents who did not have disabilities There is simply no evidence from which any reasonably jury could conclude that that decision related in anyway to Temple's age or disability

B. The Evidence is Insufficient to Support a Claim for Intentional Infliction of Emotional Distress

To establish a claim for intentional infliction of emotional distress (also known as "Outrage"), a plaintiff must show (1) extreme and outrageous conduct that (2) intentionally or recklessly inflicts emotional distress, and (3) actually causes severe emotional distress to the plaintiff Dicomes v State, 113 Wn 2d 612, 630, 782 P 2d 1002 (1989) The plaintiff must prove that a defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community " Id at 630 Whether conduct is sufficiently extreme and outrageous generally is a fact question for the jury, but it is initially for a court to determine as a matter of law whether reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability Id

Washington courts readily dismiss outrage claims unless a defendant's conduct is truly extreme For example, when an employee's co-workers and supervisors repeatedly insulted her over a period of nine months, referred to her as "fucking bitch" and "cunt," demeaned her in front of customers and other employees, screamed at her and subjected her to other forms of unpleasant and demeaning conduct, this conduct "was not so extreme and outrageous as to be regarded as atrocious or intolerable " Robel v Roundup Corp , 103 Wn App 75,

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78-81, 90, 10 P 3d 1104, review granted, 143 Wn 2d 1008 (April 10, 2001)

Here, Temple's evidence in support of this claim does not come close to meeting this standard While it is unclear exactly what evidence Temple intends to rely upon, presumably he will argue that Allstate's insistence that he comply with Agency Standards and its alleged mishandling of his or his in-laws insurance claims support this claim Even if true, this evidence plainly does not rise to the level of "atrocious or intolerable" behavior Consequently, Temple cannot establish the first or second elements of this tort, and Allstate is entitled to summary judgment on this claim See Schonauer v DCR Entm't, Inc , 79 Wn App 808, 828, 905 P 2d 392 (1995) (affirming dismissal of outrage claim)

In addition, to the extent that the evidence Temple intends to rely upon in support of this claim is the same evidence he cites in support of his other claims, including his discrimination claims, this claim should be dismissed as duplicative Anaya v Graham, 89 Wn App 588, 596, 950 P 2d 16 (1998) (affirming dismissal of plaintiff's outrage claim because it is duplicative of discrimination claim under WLAD)

C. Temple Has Not Stated a Claim for Negligent Infliction of Emotional Distress.

As the Washington Supreme Court recently affirmed, employers do not owe a duty to avoid inflicting emotional distress when dealing with employee disputes Snyder, 145 Wn 2d at 252. Accordingly, Washington courts will not recognize a claim against an employer for negligent infliction of emotional distress that arises from a workplace dispute or an employee disciplinary matter, or when the only factual basis for emotional distress is the discrimination claim Id , Robel, 102 Wn App at 90 Pursuant to these authorities, Temple's negligent infliction of emotional distress claim should be dismissed

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D. Temple's Negligent Supervision and Retention Claims Should be Dismissed because they are Duplicative of His Discrimination Claims

When a negligent supervision claim is based on the same facts as the accompanying discrimination claims, the negligent supervision claim is duplicative and should be dismissed Francom, 98 Wn App at 864-65 The same rule applies to a negligent retention claim Id at 866 Consequently, this Court should dismiss Temple's negligent supervision and retention claims

IX. CONCLUSION

For all of the foregoing reasons, Allstate Insurance Company respectfully asks the Court to dismiss all the Plaintiff's claims

DATED this 20th day of August, 2002

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